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IN THE

Supreme Court of the
United States

APR 11 1942
CHARLES L. RICH

OCTOBER TERM 1942

W. J. MEREDITH, JAMES G. MARTIN and A. R.
OHMART,

Petitioners,

versus

THE CITY OF WINTER HAVEN, a municipal cor-
poration, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI
AND SUPPORTING BRIEF

D. C. HULL

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Attorneys for Petitioners

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PETITION FOR WRIT OF CERTIORARI

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Your petitioners above named, who sued the respondents in the District Court of the United States for the Southern District of Florida, respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered February 3, 1943, in the case identified on its docket as W. J. Meredith, James G. Martin and A. R. Ohmart, appellants, versus The City of Winter Haven, et al., appellees, No. 10,402, (R. 200), a petition for the rehearing of which judgment was denied March 12, 1943 (R. 206).

STATEMENT OF THE MATTERS INVOLVED

In July, 1933, the City of Winter Haven had an outstanding bonded indebtedness of approximately \$2,148,054.78, principal and interest (R. 3, 4, 27).

The accumulated defaulted interest, as of April 1, 1933, was approximately \$195,000.00, and the defaulted principal amounted to around \$375,000.00, and the City had been in default in payment of its bonded indebtedness since 1931 (R. 4).

By a resolution adopted July 24, 1933, the City authorized the issuance of its General Refunding Bonds, Issue of 1933, dated April 1, 1933, for the purpose of refunding its outstanding bonded indebtedness (R. 27-84).

The refunding issue was divided into Series "A" bonds, to be exchanged for the outstanding 6 per cent. obligations, and Series "B" bonds, to be exchanged for the outstanding 5½ per cent obligations (R. 4).

The originally outstanding bonds consisted chiefly of bonds which matured serially from 1930 to 1962 (R. 28-57, 64 and 65).

The General Refunding Bonds, Issue of 1933, postponed all maturities to April 1, 1948, and serially thereafter to April 1, 1963 (R. 5, 11).

An amendatory resolution, adopted March 7, 1934, changing the denominations of certain refunding bonds so as to provide for a more convenient exchange with the holders of outstanding obligations in odd amounts, appears on pages 86 to 93 of the Record.

The authorizing resolution described in detail the outstanding bonds to be refunded (R. 28-57 & 64-65), and also specified the numbers, amounts and maturity dates of the 1933 refunding bonds to be issued (R. 58 & 66), and provided a definite scheme of exchange of new bonds for old bonds, so that it will always be possible for the holder of a General Refunding Bond, of the Issue of 1933, to identify the particular original bond that was refunded by the particular 1933 bond which he holds (R. 19 & 82).

The General Refunding Bonds, Issue of 1933, were validated in statutory bond validation proceedings, under the provisions of Sections 3296, et seq., Revised General

Statutes of Florida, Sections 5106, et seq., Compiled General Laws.

They were not sold on the open market, but were issued in exchange for a corresponding amount of original outstanding obligations of the City, in accordance with the authorizing resolution, which outstanding securities were cancelled and surrendered (R. 21).

As has been stated, the original outstanding debt bore interest at the rate of 6 per cent and $5\frac{1}{2}$ per cent, respectively. The 1933 refunding bonds bore semi-annually maturing interest at the rate of $3\frac{1}{2}$ per cent from April 1, 1933 to April 1, 1935, 4 per cent from April 1, 1935 to April 1, 1936, $4\frac{1}{2}$ per cent from April 1, 1936 to April 1, 1937, 5 per cent from April 1, 1937 to April 1, 1943, and thereafter at the rate of 6 per cent in the case of Series "A" bonds (R. 7) and $5\frac{1}{2}$ per cent in the case of Series "B" bonds (R. 13). The differential between the interest rate borne by the original outstanding debt and the semi-annually maturing interest borne by the new refunding bonds for the ten-year period from April 1, 1933, to April 1, 1943, was referred to in the bonds as deferred interest (R. 7 & 13). Payment of the deferred interest was postponed to the final maturity of the refunding bonds, except as hereinafter stated (R. 7, 13 & 75).

The originally outstanding bonds were non-callable bonds, each being payable on a definite maturity date, and were not subject to call for redemption prior to maturity (R. 3).

The General Refunding Bonds, Issue of 1933, were callable bonds, the City reserving the right to call and redeem such bonds, on any interest payment date, by paying a portion of the deferred interest, according to the following schedule:

On or prior to April 1, 1943, the bonds could be called at par, and accrued interest at the rate then prevailing, plus one-half of the deferred or accumulated interest for the ten-year period.

On or prior to two years before the maturity of the respective bonds, and during the period of time from April 1, 1943 to and including April 1, 1953, at par, and accrued interest at the rate then prevailing, plus three-fourths of the deferred or accumulated interest for ten years.

From April 1, 1953, to and including April 1, 1963, the bonds could be called at par, and accrued interest at the prevailing rate, plus the full deferred or accumulated interest for ten years. (R. 7, 13, 73 & 74).

Thus the holders of the originally outstanding bonds were induced to surrender their non-callable obligations and to accept in lieu thereof bonds which could be called for redemption by the City, at any time that the City might be able to take advantage of a "cheap money market" by selling new bonds and using the proceeds of such sale to call and retire the 1933 refunding bonds prior to their contract maturity dates.

In the event that the City should exercise its option to call the refunding bonds at a time when low interest rates might prevail, the refunding bondholders would of course be forced to re-invest their funds in a low interest market.

It is common knowledge that a call provision renders municipal bonds less desirable from the standpoint of long-term investors, such as insurance companies and savings banks, and tends to depreciate their market value and to hamper their ready negotiation or sale, as has been judicially noticed by the Florida Supreme Court in the case of **State v. Sarasota County**, 118 Fla. 629, 159 So. 797, decided in 1935.

As a consideration for accepting a bond with such a callable feature, it was provided that the bondholder would not completely sacrifice his right to interest at the former contract rate of 5½ or 6 per cent, but would recover, to some extent, the difference between the interest borne by the original non-callable bonds surrendered and the reduced rate of semi-annually maturing interest borne

by the 1933 General Refunding Bonds containing the call provision.

Prior to the issuance of the City of Winter Haven General Refunding Bonds, Issue of 1933, there were no decisions of the Florida Supreme Court indicating that an issue of refunding bonds not authorized at a freeholder election must bear a lower rate of interest than the bonds refunded, and no decisions of that court that threw any doubt upon any of the provisions of the Winter Haven General Refunding Bonds.

On the other hand, the Florida Court in the case of **Sullivan v. City of Tampa, 101 Fla. 298, 134 So. 211**, decided in 1931, upheld an issue of refunding bonds of the City of Tampa, bearing interest at the rate of 5½ per cent per annum, that were issued to refund a like amount of 5 per cent bonds.

Mr. Justice Brown, speaking for the Court, in an opinion unanimously concurred in, discussed at great length the contention raised by the intervening appellant taxpayer that the City of Tampa could no longer issue refunding bonds, bearing a higher rate of interest than the obligations to be refunded, without the issuance of such refunding bonds having been first approved by a majority vote of the freeholder electors of the municipality, because of the provisions contained in amended **Section 6, of Article IX, of the Florida Constitution**, adopted at the general election held November 4, 1930.

The Court held that the constitutional amendment did not deprive a municipality of the power to issue refunding bonds at a rate of interest greater than the rate borne by the obligations to be refunded, without a freeholder vote, saying, at pages 217 and 218 of 134 So.:

"The constitutional amendment unquestionably authorizes the issuance of refunding bonds without a vote of the people, and this court would not be authorized to add to the language of the constitutional amendment a condition not therein expressed; that is, by addition of a provision that

such refunding should not be permitted unless the refunding bonds should bear no higher rate of interest than the original obligations * and should not be sold for less than their full par. value. It is the function of this court to construe and interpret constitutional amendments and not to make them. The constitutional amendment plainly provides for the issuance of refunding bonds issued exclusively for the purpose of refunding the bonds or the interest thereon of such counties, districts, or municipalities. The dictionary meaning of the word 'refund' is 'to fund again or anew; to replace (a fund or loan) by a new fund.' It is also a matter of common knowledge that refunding obligations cannot always be accomplished without holding out to the creditor some inducement in the form of an increase in the rate of interest or otherwise, which would cause him to be willing to surrender his existing bonds and take the refunding bonds instead. . . .

"It will be noticed that the only limitation upon the power of counties, districts, and municipalities to issue refunding bonds which is contained in the constitutional amendment is that such bonds be issued exclusively for the purpose of refunding the bonds or the interest thereon of such counties, districts or municipalities. The constitutional provision contains no express language which purports to fix or limit the rate of interest which the refunding bonds shall bear, or to fix the price at which they may be sold. Being wholly silent as to such matters, and no such limitations being clearly implied from the use of the terms in the amendment itself, none will be implied by the court. . . . It is quite probable that the difference between the amount which may be realized from the sale of the

* Note: Emphasis has been supplied in some of the quotations in this petition.

refunding bonds and the amount of the original obligations which are to be refunded must be paid out of the general funds of the city, but if this is done it will not increase the bonded debt of the city."

The bonds then under consideration were being issued under the authority of the **General Refunding Act of 1927, Chapter 11855, Acts of 1927.**

Subsequent to the decision in the case of **Sullivan v. City of Tampa**, the Legislature enacted the **General Refunding Act of 1931, Chapter 15,772, Acts of 1931**, with provisions similar to those of the **General Refunding Act of 1927**, including the provisions that interest on refunding bonds should not exceed 6 per cent, and that the refunding bonds should not be sold for less than 95 per cent of their par value, which provisions had been construed, upheld and applied in the **Sullivan case.**

Thereafter, in October, 1932, the Supreme Court of Florida decided the case of **State v. Special Tax School District, No. 5, of Dade County**, 107 Fla. 93, 144 So. 356.

In that case, a school district had outstanding bonds, issued in 1926. They were to mature within thirty years from the date of issuance, as required by another section of the Constitution. It was held that the district might issue refunding bonds, in 1932, which need not mature within thirty years from the year 1926, as prescribed for the original bonds, but that the maturities of the refunding bonds might extend beyond the period of thirty years from 1926, and that no freeholder election to authorize the issuance of such refunding bonds was required, although it was recognized that such an extension of maturities would add to the total interest burden to be borne by the district.

On December 22, 1939, nine years after the amendment to **Section 6 of Article IX** of the **Florida Constitution**, and more than eight years after the decision in the case of **Sullivan v. City of Tampa**, and more than six years after the adoption of the resolution authorizing the

issuance of the City of Winter Haven General Refunding Bonds, Issue of 1933, and several years after the 1933 bonds had been exchanged for the originally outstanding bonds of the City of Winter Haven, the Supreme Court of Florida decided the case of **Outman v. Cone**, 141 Fla. 196, 192 So. 611.

In that case, the Florida Court did what in the **Sullivan case**; it had held it could not do, namely, it read into the constitutional amendment, by implication, a provision to the effect that a refunding bond not authorized at a freeholder election must bear a lower rate of interest than the bond refunded; otherwise, the necessary expense of refunding, added to the existing interest rate, would increase the obligation of the bond and prevent the bond from being such a refunding bond as is contemplated by the provision of the constitutional amendment permitting only refunding bonds to be issued without an approving election.

The court therefore held that a provision for the payment of deferred interest at the original rate, less previous payments, where the refunding bonds had not been authorized by the freeholders, was illegal and void.

Subsequent to the decision in **Outman v. Cone**, the City of Winter Haven authorized the issuance of new refunding bonds to refund its General Refunding Bonds, Issue of 1933, dated April 1, 1933, but repudiated all the provisions of the 1933 bonds relative to deferred interest (R. 22, 23).

In the months of August and September, 1941, the City of Winter Haven published a notice purporting to call for redemption its General Refunding Bonds, Issue of 1933, including bonds owned and held by the present petitioners, without providing for the payment of any portion of the deferred interest (R. 23, 97).

On September 9, 1941, petitioners filed their complaint in the District Court, showing that they were the holders of General Refunding Bonds, Issue of 1933, both

Series "A" and Series "B", of the total amount of \$297,900.00 (R. 22, 94-96).

By their complaint, the petitioners sought to establish their right to the payment of deferred interest, as provided in their bond contract (R. 24).

In the event that the Court should hold that the deferred interest provisions of the 1933 bonds were invalid, then petitioners sought to be subrogated to the rights of the holders of the original bonds which had been surrendered for the 1933 refunding bonds.

In seeking this alternative relief, petitioners relied upon the provisions of the resolution authorizing the 1933 refunding bonds to the effect that if any of the 1933 refunding bonds should be adjudged illegal or unenforceable, in whole or in part, the holders thereof should be entitled to assume the position of holders of a like amount of the indebtedness thereby provided to be refunded and as such to enforce their claim for payment (R. 20, 83).

On September 13, 1941, the Supreme Court of Florida, four days after the filing of the complaint in this suit, decided the case of **George Andrews v. City of Winter Haven**, reported in 148 Fla. 144, 3 So. (2nd) 805, holding the deferred interest provisions of the Winter Haven General Refunding Bonds, Issue of 1933, to be invalid and unenforceable.

However, the provision of the resolution under which a bondholder should be subrogated to the position of a holder of the original bonds, in the event the refunding bond contract should be declared invalid or unenforceable, in whole or in part, was not called to the attention of the Florida Courts.

Thereafter, on September 27, 1941, the City of Winter Haven and its defendant officials filed their motion to dismiss the complaint in this cause, on the ground that the questions of law involved had been determined by the Supreme Court of Florida adversely to the petitioners (R. 98).

The District Court granted the motion to dismiss and allowed the petitioners to amend their complaint (R. 100).

Thereafter, petitioners amended the complaint so as to demonstrate that the **Andrews case**, although purportedly brought by a bondholder, for the purpose of establishing the validity of the deferred interest provisions of the City of Winter Haven 1933 refunding bonds, was in fact brought for the purpose of invalidating the deferred interest provisions. The amendment showed that Andrews was a substantial property owner and taxpayer of the City of Winter Haven, whose property holdings were at least as extensive as his purported bond holdings (R. 102-103). The amendment further showed that no process had been issued in the **Andrews suit**, but that all the pleadings of all the parties had been filed, the argument held, and the decree signed and filed, in the course of a single morning (R. 103, 105), as demonstrated by a certified transcript of the record of the proceedings in the **Andrews suit** attached to the amendment as an exhibit (R. 109-179). The amendment further showed that the briefs filed in behalf of George Andrews, purporting to protect the interests of the bondholders of the City of Winter Haven, made no reference to the cases of **Sullivan v. City of Tampa**, and **State v. Special Tax School District No. 5 of Dade County**, or any other cases which had been decided by the Supreme Court of Florida prior to the time of the issuance of the Winter Haven General Refunding Bonds, Issue of 1933, and that no effort whatever had been made on behalf of George Andrews to direct the attention of the Florida Supreme Court to the fact that it had announced and declared a contrary principle of law, prior to the time when the Winter Haven refunding bonds were issued, or to invoke the doctrine of both the State and Federal courts that the law to be applied in considering a contract is the law which existed or had been judicially declared at the time when the contract was made (R. 105-107).

By stipulation of counsel, the motion to dismiss the original complaint in the present case was made applicable

to the complaint as amended, the respondents thereby admitting as true the facts set out in the complaint and in the amendment (R. 181; 182).

The defendants took the position that, under the doctrine of **Erie Railroad Company v. Tompkins**, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, and subsequent cases, the Federal Court was bound to follow the latest decisions of the Supreme Court of Florida in determining the validity of the deferred interest provisions, and that the petitioners were not entitled to assume the position of holders of the original bonds and as such to enforce the original interest rate, on the ground that the 1933 refunding bonds had not been invalidated as a whole, but that the deferred interest provisions had been declared to be a severable portion of the bond contract which could be invalidated without affecting the validity of the remainder of the contract.

The petitioners contended that the law to be applied by the Federal Court was the law of Florida as it had been announced and declared by the Supreme Court of Florida at the time when the bonds were issued, and that the Florida Supreme Court, itself, had held it to be the law in Florida that the rule of decision to be applied in considering a contract is the rule announced prior to the making of the contract, in reliance upon which the contract was made; even though the Court, after the making of the contract, has reached a different decision.

The petitioners further contended that the language of the resolution authorizing the bonds clearly entitled the petitioners to assume the position of holders of a like amount of the original bonds and as such to enforce their claim for payment, in the event that any part of the refunding bond contract should be adjudged illegal or unenforceable (R. 20).

On June 6, 1942, the District Judge dismissed the complaint, as amended, and ordered that the defendants go hence without day; and thus finally disposed of the litigation in the District Court (R. 182).

From that order an appeal was taken.

The present petitioners assigned as error the action of the District Court in not following the case of **Sullivan v. City of Tampa**, 101 Fla. 298, 134 So. 211, the Florida Court having previously adopted and followed the "principle of reliance" upon former decisions as announced in **Gelpcke v. Dubuque**, 1 Wall. 175, (See **Columbia County Commissioners v. King**, 13 Fla. 451).

Petitioners also specified error in that, after holding the deferred interest provisions of the bond contract to be illegal or unenforceable, the District Court further held that the petitioners were not entitled to assume the position of holders of a like amount of the bonds refunded and as such enforce their claim for payment.

The Circuit Court took the view, erroneously as we contend, that no Federal question, constitutional or otherwise, was presented. It decided that the state of the law in Florida on the matters in issue is not clear, settled and stable, and that the Federal courts, though possessing jurisdiction, should decline to exercise it, leaving the petitioners to their remedy in the State courts. Accordingly, the Circuit Court reversed the judgment of the District Court and dismissed the cause, without prejudice to petitioners' right to proceed in the State court. (R. 200).

Judge Sibley filed a dissenting opinion in which he took the position that, there being a presently acute justiciable controversy, the Federal Court was bound to declare the rights of the parties, since the same power and the same duty to decide cases applies to cases between citizens of different states arising under the laws of a state as applies to controversies arising under the Constitution and laws of the United States, and since this case involves no invasion of high state functions or policies as to which caution is due, but only the question of how much this City owes these bondholders on calling their bonds for payment before due.

Judge Sibley apparently thought, however, that the doctrine announced in **Erie Railroad Company v. Tomp-**

kins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, required the Court to follow the **Andrews case** and hold invalid the provision for payment of a part of the deferred interest on call of the bonds, but that justice should be done by remitting the bondholder to his interest rights under the old bonds to the extent necessary to make good the loss caused by the partial unenforceability of the new bonds. (R. 198).

On February 22, 1943, a petition for rehearing (R. 201) was filed by appellants (petitioners herein), in which they insisted, among other things, that a Federal question is involved, and in which they insisted also that the Circuit Court had considered, sua sponte, matters which the appellants (petitioners) had had no opportunity to argue, and had decided to remit them to their remedy in the State courts, even though the appellants (petitioners), who were citizens of another state and had shown the jurisdictional amount in controversy, had not had an opportunity to insist that their contract rights be adjudicated in the Federal courts, and that the decisions cited in the majority opinion to support the action of the Court in remitting them to their remedy in the State courts are essentially different from this case.

On March 12, 1943, an order denying the petition for rehearing was entered (R. 206).

BASIS OF THE SUPREME COURT'S JURISDICTION

It is contended that the Supreme Court of the United States has jurisdiction, under **Section 240 (a)** of the **Judicial Code**, as amended, **Title 28, U. S. C. A., Section 347 (a)**, to review the judgment.

QUESTIONS PRESENTED

The following questions are presented:

1. Where plaintiffs show by their complaint filed in a Federal Court that they are citizens of the State of

Kansas, that defendants are citizens of the State of Florida, that the jurisdictional amount is involved; that there is an actual controversy presenting justiciable issues requiring determination and entitling plaintiffs to a declaratory judgment and an injunction in support of such declaration, and where the entire matter has been vigorously litigated on both sides and none of the litigants has even suggested that the plaintiffs be remitted to their remedy in the State courts, and where the highest State court had decided one of the main questions involved prior to the time when the contract rights of the litigants arose and had also adopted the "principle of reliance" announced in the case of **Gelpcke v. Dubuque**, 1 Wall. 175, should the Federal Court refuse to decide the case and remit the plaintiffs to their remedy in the State courts, on the ground that the highest State Court, after the making of the contract, had decided the question in a way contrary to the original decision of the highest State Court, such later State Court decision having been rendered in a case in which neither the earlier State Court decision on the particular point nor its prior decision adopting the principle announced in the **Gelpcke case** was called to the attention of the State Court, it being a fact that the case presented to the Federal Court involves no invasion of high State functions or policies, but only a question of how much the defendant city owes the plaintiffs on calling their bonds for payment before their maturity?

2. Where plaintiffs show by their complaint filed in a Federal Court that they are citizens of the State of Kansas, that defendants are citizens of the State of Florida, that the jurisdictional amount is involved, that there is an actual controversy presenting justiciable issues requiring determination and entitling plaintiffs to a declaratory judgment and an injunction in support of such declaration, and where the entire matter has been vigorously litigated on both sides and none of the litigants has even suggested that the plaintiffs be remitted to their remedy in the State courts, and where there are no State

court decisions on one of the main points involved that are contrary to the plaintiff's contentions, should the Federal courts refuse to decide the case and remit the plaintiffs to their remedy in the State courts, it being a fact that the case presented to the Federal courts involves no invasion of high State functions or policies, but only a question of how much the defendant city owes the plaintiffs on calling their bonds for payment before their maturity?

3. Where plaintiffs show by their complaint filed in a Federal Court that they are citizens of the State of Kansas, that defendants are citizens of the State of Florida, that the jurisdictional amount is involved, that there is an actual controversy presenting justiciable issues requiring determination and entitling plaintiffs to a declaratory judgment and an injunction in support of such declaration, and where the entire matter has been vigorously litigated on both sides and none of the litigants has even suggested that the plaintiffs be remitted to their remedy in the State courts, and where the highest State Court had decided one of the main questions involved prior to the time when the contract rights of the litigants arose and had also adopted the "principle of relance" announced in the case of **Gelpcke v. Dubuque**, 1 Wall 175, and where the highest State Court, after the making of the contract has decided the question in a way contrary to the original decision of the highest State Court, such later State Court decision having been rendered in a case in which neither the earlier State Court decision on the particular point nor its prior decision adopting the principle announced in the **Gelpcke case** was called to the attention of the State Court, it being a fact that the case presented to the Federal Court involves no invasion of high State functions or policies, but only a question of how much the defendant city owes the plaintiffs on calling their bonds for payment before their maturity, have not the plaintiffs presented a Federal question, and should not the Federal Court construe and apply **Section 34** of the

Federal Judiciary Act of September 24, 1789, C. 20., 28 U. S. C., Section 725, 28 U. S. C. A., Section 725, and decide whether the "principle of reliance" or "contract exception," laid down in the **Gelpcke case**,⁴ and adopted by the highest State Court before the contract rights of the plaintiffs arose, applies to the contract in question, rather than to require the parties to relitigate the entire controversy in the State courts, it appearing that the State Supreme Court not only has not decided that retrospective operation shall be given to its overruling decisions, but has decided that retrospective application shall not be given to its overruling decisions?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

There are special and important reasons why the writ of certiorari should be issued:

1. The doctrine of the **Erie Railroad** case and the other decisions of this Court that have followed it do not require the Federal courts to follow the "latest" State Court decisions, in cases where the highest State Court has decided an important question of State law prior to the making of a contract, and has decided the same question differently after the contract was made, especially where the State Court has adopted the "principle of reliance" or "contract exception," announced in the case of **Gelpcke v. Dubuque**, 1 Wall. 175, and has never receded from it. Yet, in a case where the Federal jurisdiction has been invoked by citizens of another State, who have shown that the jurisdictional amount is involved, and that there is an actual controversy presenting justiciable issues requiring determination and entitling plaintiffs to a declaratory judgment and an injunction in support of such declaration, and where the parties to the controversy have litigated the question in both the District Court and in the Circuit Court of Appeals, without objection or protest, the Circuit Court of Appeals has refused to decide the controversy as to which of the State Court decisions is applicable to the contract rights of the litigants, but

has remitted the plaintiffs (petitioners) to their remedy in the State courts. Since the State Court has never receded from the doctrine of the **Gelpcke case**, and since the case now presented involves no invasion of high State functions or policies, but only a question of how much a public corporation debtor owes the plaintiffs (petitioners) under its contract with them, it is important that this Court decide (a) whether the Federal Courts should not adjudicate the controversy and (b) what effect the overruling State Court decision has upon contract rights acquired prior to the rendering of the overruling decision.

2. This case presents the Federal question as to whether the Federal courts shall themselves construe and apply **Section 34** of the **Judiciary Act** of September 24, 1789, **C. 20, 28 U. S. C., Section 725, 28 U. S. C. A., Section 725**, in a controversy involving contract rights of the litigants, and decide whether the "principle of reliance" or "contract exception," laid down in the **Gelpcke case**, and adopted by the highest State Court before the contract rights of the litigants arose, applies to the contract in question, or whether, even though the plaintiffs (petitioners), who are citizens of another state, and who have invoked the jurisdiction which the Federal courts undoubtedly possess, are to be remitted to their remedy in the State courts, it appearing that there is a conflict between the State Court decisions announced before the contract was made and those announced afterwards, but that the State Court has never receded from the principle announced in the **Gelpcke case**. The parties litigant having submitted the controversy between them to the Federal courts and having fully litigated the matter there, it is important that this Court decide whether the earlier or later State Court decisions apply to and determine the contract rights brought in question.

3. Since the Federal Constitution extends the judicial power of the Federal courts to controversies between citizens of different states, even where no Federal question is involved, and since the Federal jurisdiction has been invoked by citizens of another state, in a presently

acute justiciable controversy, and since the case involves no invasion of high State functions, but only a question of how much money a public corporation debtor owes its creditors on refunding bonds called before their maturity, and since the refunding bond contract provides that "if any of the bonds hereby authorized be adjudged illegal or unenforceable, in whole or in part, the holders thereof shall be entitled to assume the position of holders of a like amount of the indebtedness hereby provided to be refunded and as such enforce their claim for payment," it is important that the Federal courts decide (a) whether the contract is or is not "illegal or unenforceable" and (b), if it is adjudged "illegal or unenforceable," whether and to what extent the creditors so invoking the Federal jurisdiction are entitled to be remitted to their interest rights under the old bonds, that question not having been foreclosed against such creditors by any decision of the State Court.

PRAYER FOR WRIT OF CERTIORARI

WHEREFORE, your petitioners pray that a writ of certiorari be issued, under the seal of this Court, directed to the United States Circuit Court of Appeals, commanding the said Circuit Court of Appeals, to send to this Court in due course all matters essential to a consideration of the questions presented by this petition, had in the case entitled on its docket W. J. Meredith, James G. Martin and A. R. Ohmart, appellants, versus The City of Winter Haven, a municipal corporation, et al., appellees, No. 10,402, to the end that said cause may be reviewed and determined by this Court, as provided by the statutes of the United States, and that the judgment of the said Circuit Court of Appeals in said cause be reversed, and for such further relief as to this Court may seem proper.

Respectfully submitted,

D. C. HULL

ERSKINE W. LANDIS

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS BELOW

No opinions were filed in the District Court. The opinions filed in the Circuit Court of Appeals appear in the record (R. 189, 198).

II.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

Petitioners seek a writ of certiorari, under **Section 240 (a)** of the **Judicial Code**, as amended, **Title 28 U.S.C.A., Section 347 (a)**, to review a final judgment of the Circuit Court of Appeals for the Fifth Circuit. The grounds or reasons which petitioners conceive should impel this Court to review the judgment are set out in the petition (pages 16 to 18). To be concise, we refrain from repeating them.

III.

STATEMENT OF THE CASE, QUESTIONS, AND SPECIFICATIONS OF ERRORS

The essential facts of the case, material to the consideration of the questions presented, with appropriate page references to the printed record, have been stated in the petition (pages 1 to 13). The questions presented and the errors specified are also stated in the petition (pages 13 to 16). In the interest of brevity they will not be repeated here.

IV.

ARGUMENT

The Florida Constitution of 1885 is still in force, although some of its provisions have been amended or supplemented from time to time.

Section 6 of Article IX, as originally adopted, provides that:

"The Legislature shall have power to provide for issuing **State bonds** only for the purpose of repelling invasion or suppressing insurrection, or for the purpose of redeeming or refunding bonds already issued, **at a lower rate of interest.**" *

It will be noted that **no limitation** was placed upon the power of the Legislature to authorize the issuance of **municipal bonds**.

On November 4, 1930, **Section 6 of Article IX**, was amended so as to read as follows:

"The Legislature shall have power to provide for issuing **State bonds** only for the purpose of repelling invasion or suppressing insurrection, and the counties, districts or **municipalities** of the State of Florida shall have power to issue bonds only after the same shall have been approved by a majority of the votes cast in an election in which a majority of the freeholders who are qualified electors residing in such counties, districts, or municipalities shall participate, to be held in the manner to be prescribed by law; **but the provisions of this law shall not apply to the refunding of bonds issued exclusively for the purpose of refunding of the bonds or the interest thereon of such counties, districts, or municipalities.**" *

It will be noted that, in the amendment, the provision for a "lower rate of interest" in relation to refunding bonds has been **dropped**, and that it **never did** apply to refunding bonds issued by **municipalities**.

* Note: Emphasis has been supplied in some of the quotations in this brief.

* Note: The latter part of the amendment is not confined to bonds issued to refund bonds that have already been refunded, but excepts from the operation of the prior part of the section the issuance of bonds to refund any municipal bonds or the interest thereon when the refunding bonds to be issued are designed merely to extend the time for the payment of the indebtedness. (See: **State v. City of Miami**, 100 Fla. 1388, 131 So. 143, decided December 5, 1930.)

In February, 1931, the City of Tampa authorized the issuance of \$200,000.00 of refunding bonds, bearing interest at the rate of $5\frac{1}{2}$ per cent, to refund \$200,000.00 of outstanding bonds, issued prior to 1930, bearing interest at the rate of 5 per cent. The bonds were validated in statutory bond validation proceedings, in March, 1931, and the validation decree was affirmed by the Supreme Court of Florida on April 23, 1931. The case is reported as **Sullivan v. City of Tampa**, 101 Fla. 298, 134 So. 211.

Mr. Justice Brown, speaking for the Court, in an opinion unanimously concurred in, discussed at great length the contention raised by the intervening appellant taxpayer that the City of Tampa could no longer issue refunding bonds bearing a higher rate of interest than the obligations to be refunded, without the issuance of such refunding bonds having been first approved by a majority vote of the freeholder electors of the municipality, because of the provisions contained in amended **Section 6, of Article IX, of the Constitution**, adopted November 4, 1930.

The Court held that the constitutional amendment did not deprive a municipality of the power to issue refunding bonds at a rate of interest greater than the rate borne by the obligations to be refunded, without a freeholder vote.

The bonds then under consideration were being issued under the authority of the **General Refunding Act of 1927, Chapter 11855, Acts of 1927**.

Subsequent to the decision in the case of **Sullivan v. City of Tampa**, the Legislature enacted the **General Refunding Act of 1931, Chapter 15772, Acts of 1931**, with provisions similar to those of the **General Refunding Act of 1927**, including the provisions that interest on refunding bonds should not exceed 6 per cent, and that the refunding bonds should not be sold for less than 95 per cent of their par value, which provisions had been construed, upheld and applied in the **Sullivan case**.

Thereafter, the City of Winter Haven General Refunding Bonds, Issue of 1933, were issued in exchange for bonds previously issued by the municipality.

After the 1933 Winter Haven General Refunding Bonds were issued, the Florida Supreme Court decided the case of **Outman v. Cone**, 141 Fla. 196, 192 So. 611.

In that case, the Court did what it held in the **Sullivan case** it could not do, namely, it read into the constitutional amendment, by implication, a provision to the effect that a refunding bond not authorized at a freeholder election must bear a lower rate of interest than the bond refunded; otherwise, the necessary expense of refunding, added to the existing interest rate, would increase the obligation of the bond and prevent the bond from being such a refunding bond as is contemplated by the provision of the amendment permitting only refunding bonds to be issued without an approving freeholder election.

The Court therefore held that a provision for the payment of deferred interest at the original rate, less previous payments, where the refunding bonds had not been authorized by the freeholders, was illegal and void.

While this present case was pending in the District Court, the Florida Supreme Court decided the case of **Andrews v. City of Winter Haven**, 148 Fla. 144, 3 So. (2nd) 805, holding the deferred interest provisions of the 1933 Winter Haven General Refunding Bonds to be invalid and unenforceable.

However, the provision of the authorizing resolution to the effect that a bondholder should be remitted to the position of a holder of the original bonds, in the event the new contract should be declared invalid or unenforceable, in whole or in part, was not called to the attention of the Florida Court in the **Andrews case**. In fact, the resolution was not called to the attention of the Court at all. Hence, the Court had only a part of the contract before it.

The briefs filed in the case by Mr. Andrews made no reference to the **Sullivan case**, or to the fact that the

Florida Court had announced and declared a contrary principle of law prior to the issuance of the Winter Haven bonds. The briefs made no effort to invoke the doctrine of both the State and Federal Courts that the law to be applied in considering a contract is the law which existed or had been judicially declared at the time when the contract was made.

Gelpcke v. City of Dubuque,
1 Wallace (U. S.) 175.

Columbia County Commissioners v. King,
13 Fla. 451, (decided over 70 years ago)

State ex rel Nuveen v. Greer,
88 Fla. 249, 102 So. 739 (decided in 1924)

Humphreys v. State ex rel. Palm Beach Co.,
108 Fla. 92, 145 So. 858 (decided January, 1933)

Alta Cliff Co. v. Spurway,
113 Fla. 633, 152 So. 731 (decided in November, 1933)

Lee v. Bond-Howell Lumber Co.,
123 Fla. 202, 166 So. 733 (decided March, 1936)

In **State ex rel. Nuveen v. Greer**, it was declared that the principle of **Gelpcke v. Dubuque** and **Columbia County v. King** is a matter of constitutional right, recognized and protected by the Florida Constitution.

The doctrine of the **Gelpcke case** has never been overruled. It is not affected by the decision in **Erie Railroad Co. v. Tompkins**, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188.

It is true that several of the cases following the **Erie Railroad case** hold that, as a general proposition, the Federal courts must follow the "latest" decision of the State courts, and that the Federal courts are not at liberty to follow earlier State Court decisions merely because the Federal Court considers the earlier State Court decisions to be better reasoned, or to reach a more desirable result, than the later decisions overruling them. Never-

theless, it is submitted that it has never been held that a State Court decision construing a provision of the Constitution of the State, and upon the strength of which contract rights have been entered into, is to be disregarded in favor of a later decision overruling the former holding, thereby invalidating the contract.

There is an illuminating discussion of this question in an article by Professor Orvill C. Snyder, of the Brooklyn Law School, St. Lawrence University, published in the summer of 1940, in the **Illinois Law Review**, Volume 35, page 121, entitled: "**Retrospective Operation of Overruling Decisions.**"

Professor Snyder states, at Page 130 of his article, that:

"In the cases, retrospective operation of overruling decisions is stated as the general rule but consistently with exceptions. The most discussed exception is the one, taking its rise from certain language in the case of **Ohio Life Insurance & Trust Co. v. Debolt**, which may be called the contract exception. It may briefly be stated to the effect that an overruling decision will not be given retrospective operation to affect contracts made or property rights acquired in reliance upon the decision overruled."

Although, at page 133, he states that the "contract exception" to the retrospective operation of overruling decisions was formerly thought to be based upon constitutional grounds, nevertheless, he demonstrates, at page 139, that the "contract exception" has survived the decisions holding that a change of decision is not the making of a law, in violation of the impairment guaranty of the Federal Constitution.

Professor Snyder discusses at some length the case of **Gelpcke v. Dubuque**, 1 Wall. 175, and the subsequent decisions of the State and Federal Courts following the **Gelpcke** case. He shows that the rule of the **Gelpcke**

case, as stated in the opinion, "rests upon the plainest principles of justice." The particular principle referred to he designates as the "principle of reliance."

The "principle of reliance" is a principle of the common law, which is shown by Professor Snyder to ante-date the Federal Constitution. This is demonstrated, at page 146 of the article, by quotations and citations from **Blackstone's Commentaries**, **Kent's Commentaries**, the **Federalist Papers**, **Bracton**, and **Coke upon Littleton**.

The principle is that the law is a rule of conduct, that is, a rule relating to the conduct of a person who is to obey the rule or suffer the sanctions of the law if he does not, and since the only rule anyone can obey is the rule which exists and which he can discover at the time he acts, ignorance of which he will not be allowed to plead as an excuse, therefore, a person has the right to be judged by the rule which, at the time he acts, he can discover and then obey if he will.

This "principle of reliance" forms the basis of the doctrine of **stare decisis**.

It is the same principle that is involved in the constitutional prohibition against ex post facto legislation and against legislation impairing the obligation of contracts. The "principle of reliance" is not the constitutional guaranties themselves, but it is the principle underlying both of these guaranties.

It is a principle of the common law, which existed before the time of written constitutions.

In this connection, it should be noted that **Section 71, Revised General Statutes of Florida, 1920 (Section 87, Compiled General Laws of Florida, 1927)**, which has been in force since November 6, 1829, provides that:

"The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are hereby declared to be of force in this State: Provided, the said statutes

and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this State."

It is, of course, not our purpose to urge the complete adoption of the thesis of Professor Snyder's article. All that we ask this Court to do is to recognize and apply the "principle of reliance" or "contract exception" laid down in the **Geipcke case** and adopted by the Supreme Court of Florida as a principle of substantive law.

Professor Snyder's article states, in footnote 217, on page 144, of **Volume 35, Illinois Law Review**, that the case of **Erie Railroad Company v. Tompkins**, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, "probably requires the federal courts to follow the state rule on retrospection in all issues of state law where the state courts have held expressly either that an overruling decision relates backward or that it relates forward: * * *

"Although the federal contract exception has always been curiously involved with the general law doctrine of **Swift v. Tyson**, * * * the overruling of **Swift v. Tyson** does not prevent the federal courts from following the exception where the state courts have not decided that retrospective operation shall be given to its overruling decision."

The article also points out that on December 4, 1939, Chief Justice Hughes, in a concurring opinion, with Justices McReynolds and Roberts, with relation to the retrospective effect of an overruling decision of the Supreme Court of Oklahoma, said:

"I think that we are not at liberty to assume that the Oklahoma court would so far depart from the plain requirements of justice. * * * The state court has not spoken to that effect."

Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U. S. 4, 60 Sup. Ct. 215. (Text 219), decided in 1939.

Pertinent portions of Professor Snyder's article are printed in the Appendix to this brief.

Since the Supreme Court of Florida has expressly declared the "contract exception" or "principle of reliance" to be the law of Florida (see **Columbia County v. King**, supra, **State ex rel. Nuveen v. Greer**, supra, **Humphreys v. State ex rel. Palm Beach Co.**, supra, **Alta Cliff Co. v. Spurway**, supra, and **Lee v. Bond-Howell Lumber Co.**, supra), it is insisted that the Federal Courts are bound by the rule of the **Erie case** to apply the "contract exception" or "principle of reliance" and to follow the rule of **Sullivan v. City of Tampa** in determining the petitioners' rights under their refunding bond contract.

But the District Court felt impelled to follow the "latest" decision of the Florida Court, and held the deferred interest provisions of the bond contract illegal and unenforceable, although holding that the city had the right to call the bonds without paying any part of the deferred interest that was specifically provided to be paid in the event the bonds were called, or in other words, that the provision for payment of a stated portion of the deferred interest upon calling the bonds should be treated as eliminated and the City permitted to redeem the bonds on call without paying any part of the deferred interest.

However, the refunding bond contract protects the bondholders against this very contingency, for Section 20 of the resolution authorizing the 1933 bonds, provided that:

"If any of the bonds hereby authorized be adjudged illegal or unenforceable, in whole or in part, the holders thereof shall be entitled to assume the position of holders of a like amount of the indebtedness hereby provided to be refunded and as such enforce their claim for payment." (R. 83).

Thus, the takers of the 1933 refunding bonds foresaw the possibility of just such a situation as has now arisen, and the City and its bondholders expressly provided, in the contract, that in such event, the holders of the original

bonds, having exchanged their original holdings for the 1933 refunding bonds and cooperated with the City in adjusting its financial affairs, would not be penalized, in the event a portion of the new refunding bond contract should be held invalid, and be forced to accept a contract with one or more features eliminated therefrom, which might, very well, as in the instant case, result in a situation which the original bondholders would never have entered into willingly, but would have the option, in such a contingency, to revert to their rights under the original bond contract.

There was nothing unfair or illegal about this provision. On the contrary, it is extremely unfair to hold, as the District Court has held, that the bondholder, having been induced to surrender his original contract in exchange for a new contract, a vital portion of which has now been whittled away by court construction, must be bound by that portion of the new contract which survives the decision of the Court, and which wholly favors the City, and thus be placed in the position of having accepted a contract which he did not make, and could not have been forced to accept, although at the time of surrendering his original bond, it was expressly stipulated between the bondholder and the City that, unless he chose to do so, the bondholder could not be forced to accept less than the entire new contract, in the event any portion of it proved illegal or unenforceable.

The defendants in the District Court relied upon the ruling of the Florida Supreme Court in the **Andrews case** that the call provision of the 1933 refunding bonds could be separated from the deferred interest provision, which forms an integral portion of the call feature, from which the State Court concluded that the City was entitled to call and redeem the bonds, but did not have to pay any portion of the deferred interest in order to redeem or pay the bonds on call.

The amendment to the complaint, however, shows that in the **Andrews case**, the State Court did not have before it that provision of Section 20 of the authorizing reso-

lution which allows the refunding bond takers to assume the position of holders of a like amount of the original bonds in the event any portion of the refunding bond contract should be held illegal or unenforceable (R. 107).

In fact, the amendment shows that no part of the resolution authorizing the 1933 refunding bonds was brought to the attention of the Court in the **Andrews case**, either by the pleadings or by the briefs, and that the bond contract was not fully submitted to the Circuit Court of Polk County or to the Supreme Court of Florida (R. 102).

The only portion of the refunding bond contract pleaded in the **Andrews case** was a copy of one of the bonds (R. 142) and a copy of one of the deferred interest coupons (R. 111).

Instead of submitting a copy of the resolution authorizing the 1933 refunding bonds, the plaintiff in the **Andrews case** submitted a copy of a preliminary agreement between the City of Winter Haven and certain creditors who agreed to set up a refunding agency, which agreement formed no part of the City's contract with its bondholders (R. 119).

There was, therefore, no ruling whatever by the State Court on the right of the plaintiffs (petitioners) to assume the position of holders of the original bonds.

In **Jefferson County v. Hawkins, Trustee, 23 Fla. 223, 2 So. 362**, the Supreme Court of Florida considered a case where the County had issued certain bonds, referred to for convenience as "blue bonds." Later, the County, without legislative authorization, issued refunding bonds in lieu of the "blue bonds," for the principal of the bonds and for the matured interest. The new or refunding bonds were referred to as "white bonds." The Court held that the "white bonds" were void, but that when the County took up the "blue bonds" with the "white bonds," that did not extinguish the debt, but the debt remained until paid. It was further held that the County was obligated to pay interest on the principal of the "blue bonds" at the contract rate, and to pay interest on the matured "blue bond" interest coupons, from their maturity, at the legal rate.

In the case of *State, ex rel. Gillespie v. Walthal*, 124 Fla. 866, 169 So. 552, decided July 21, 1936, the Florida Supreme Court, speaking of the identical issue of Winter Haven 1933 refunding bonds involved in the instant case emphasized the fact that, **on the strength of the validation decree, procured by the City**, the original bonds had been exchanged for the refunding bonds and surrendered to the City, and **held that the refunding bonds "therefore were, at least valid extensions pro tanto of the original obligations."**

Neither of these cases has ever been overruled.

Yet, in the present case the District Court, after holding the deferred interest portion of the call provisions of the refunding bond contract illegal and unenforceable, went further and held that the plaintiffs (petitioners) were not entitled to assume the position of holders of a like amount of the bonds refunded and as such enforce their claim for payment.

On appeal, the appellants (petitioners) assigned as error the holding of the District Court that the bond contract was in part illegal and unenforceable because of the Florida decisions announced after its making. They also assigned as error the holding of the District Court that the plaintiffs (petitioners) were not entitled to be remitted to the position of holders of a like amount of the bonds refunded.

It is insisted that appellants (petitioners), on the showing made, were entitled to have these questions determined by the Circuit Court of Appeals.

It is also insisted that the case presented a Federal question, that is, the construction and application of a Federal statute, **Section 34 of the Federal Judiciary Act of September 24, 1789, C. 20, 28 U.S.C.A., Section 725**, which provides that:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be re-

garded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

and that the petitioners were entitled to have the Federal courts apply the principle announced by the Supreme Court of the United States in the case of **Gelpcke v. Dubuque**, 1 Wall. 175, and follow the law as judicially declared at the time of the making of the contract involved, that is, to recognize and apply the "principle of reliance" or "contract exception," laid down in the **Gelpcke case**, and adopted by the Supreme Court of Florida, as a principle of substantive law, before the contract in question was made."

However, it appears that the Circuit Court of Appeals has, sua sponte, decided to remit petitioners to their remedy in the State courts, even though their contract rights have been submitted to the Federal courts, by both parties to the contract, and the matters in controversy have been fully litigated in the Federal courts, without objection or protest from anyone, and notwithstanding the fact that, as pointed out in the dissenting opinion of Circuit Judge Sibley, the case "involves no invasion of high State functions or policies as to which caution is due, but only a question of how much this City owes these bondholders on calling their bonds for payment before due."

Respectfully submitted,

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APPENDIX

EXCERPTS FROM THE ARTICLE ENTITLED

"RETROSPECTIVE OPERATION OF OVERRULING DECISIONS"

35 Illinois Law Review 121

EXCEPTIONS TO RETROSPECTIVE OPERATION

In the cases, retrospective operation of overruling decisions is stated as the general rule but consistently with exceptions. The most discussed exception is the one, taking its rise from certain language in the case of **Ohio Life Insurance & Trust Co. v. Debolt**, which may be called the contract exception. It may briefly be stated to the effect that an overruling decision will not be given retrospective operation to affect contracts made or property rights acquired in reliance upon the decision overruled. Much ink has flowed in efforts to restrict the rule against retrospection to this exception, in attempts to narrow the exception itself, and in explanations of its basis.

It has been declared that the only exception pertains solely to contracts and property rights acquired by contract. However, a personal-rights exception has appeared in criminal prosecutions; and puzzling, perhaps peculiarly instructive, is the fact that when this happened the contract exception was introduced into the reasoning with the personal-rights exception later being cited to support the contract exception. It has been sought to narrow the contract exception to cases in which decisions construing statutes are overruled but the exception had been announced in the field of constitutional construction and has emerged in the field of pure case law. It has been essayed to confine the contract exception to cases of actual reliance on the overruled decision—with the result of raising a pre-

sumption of reliance.¹¹¹ It has been suggested that the contract exception is one of the federal courts not recognized by state courts; that it is followed by the federal courts only in cases originating in these courts but not by the Supreme Court in cases coming to it from state courts of last resort; and that when followed by the federal courts it is followed only in cases involving questions of state law. Yet the exception has spread widely among state courts and there with extended scope. Even in the federal courts the original dictum was uttered in a case in which the Supreme Court was reviewing the decision of a state supreme court,¹¹² and it cannot be overlooked that another case, often cited as an exception to the retrospective operation of overruling decisions although this seems clearly an erroneous view of the case, was decided by the Supreme Court in reversing the Court of Appeals of New York. Moreover, when considering the validity of a federal statute in an action originating in a federal court—a question of federal law in a federal court, the Supreme Court has said that “an all inclusive statement of a principle of absolute retroactive invalidity cannot be justified,”¹¹³ i.e., that relation backward of a decision holding

¹¹¹ (In footnote 111, the author demonstrates that “the prevailing rule is that this reliance need not be affirmatively shown, but will be implied from the attendant circumstances of the case,” and that “reliance will be presumed until it is affirmatively proved that there was no reliance.”)

¹¹² *Ohio Life Insurance Co. v. Debolt*, *supra* note 102.

¹¹³ *Chicot County Drainage District v. Baxter State Bank*, 60 S. Ct. 317, 319 (1940). In this case an action was brought on some bonds in a United States district court. The defendant set up an earlier decree of the same court cancelling the bonds and enjoining their enforcement. The decree was held invalid by the lower courts “because, subsequent to its entry, this Court in a proceeding relating to a municipal district in Texas had declared the statute under which the District Court had acted to be unconstitutional.” The Supreme Court said: “The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree.” Citing *Norton v. Shelby County*, 118 U. S. 425, 442 (1886) and *Chicago, Indianapolis & Louisville Ry. Co. v. Hackett*, 228 U. S. 559, 566 (1913). The Court continued: “It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual

a federal statute invalid may be limited. If so, why not the retrospective operation of a decision overruling a previous decision? All in all, trying to reduce the rule against retrospective operation to a little, narrow exception seems somewhat signally marked with insuccess. The rule is hard to confute.

BASIS OF THE CONTRACT EXCEPTION

In the beginning it was thought that the contract exception should be based upon constitutional grounds, as the following widely quoted passage from **Douglass v. Pike County** witnesses: "The true rule is to give the change in judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retrospective. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text-itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment . . . We cannot give then a retroactive effect without impairing the obligation of contracts long before entered into." The import of this seems to be that the judicial act of construing a statute is **making** law as much as the enactment of a statute by a legislature and, hence, is **passing** a law within the meaning of the constitutional guaranty of the obligation of contracts.

If we are to judge by the citations in practically every case giving it, Mr. Chief Justice Taney originated this

existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects—with respect to particular relations, individual and corporate, and particular conduct, private and official." Can it not also be said that the actual existence of a decision is an operative fact which must be considered when the decision is declared to be invalid by overruling? The overruled decision cannot totally be erased by a new judicial declaration. While the overruled decision truly never was law, the unconstitutional statute also truly never was law.

theory in 1853 in the case of **Ohio Life Insurance Co. v. Debolt**, which, as was asserted, involved a change of construction of the constitution of Ohio. A charter containing tax exemptions had been granted in 1845. For half a century it had been considered that the constitution of the state did not prohibit tax exemptions in charters and it was contended that the Ohio court upheld legislation of 1851 by changing its construction of the constitution thereby impairing the charter contract. The Chief Justice indicated that such a change could constitute an impairment of a contract. In so saying, he relied upon **Rowan v. Runnels**, decided in 1847. In this case, originating in the federal courts upon notes given for the sale of slaves, the Supreme Court followed a construction of the constitution of Mississippi made by it before the notes were given rather than a construction made by the courts of Mississippi after the notes were given. The **Debolt** idea was referred to in 1863 in **Gelpcke v. Dubuque** and in 1879 in **Douglass v. Pike County**, both of which presented a change of decision by the supreme court of a state on the constitutional validity, under the state constitution, of state legislation. These are the sources of the contract exception. Since each case involved the meaning of a constitution, the theory announced in them considered as a theory of making law, is a theory of making constitutional law. Hence, the theory originated as one of constitutional construction rather than of statutory construction. However, many state courts extended the theory to the field of statutory construction.

COLLAPSE OF A CONSTITUTIONAL BASIS

But the theory has not provided a constitutional basis for the contract exception. In the field of statutory construction, the Supreme Court has repeatedly held that a change of decision by a state court as to the "meaning and scope" of a state statute is not making a law in violation of the impairment guaranty. In the field of constitutional construction, the Supreme Court had deserted the theory even before **Douglass v. Pike County** was decided; for in

Railroad Co. v. McClure, the court had held that, although a state constitution is a law within the meaning of the impairment guaranty, a change in judicial construction of a constitution does not violate that guaranty—a view frequently reiterated. While several state courts adopted the making-law-impairing-contracts view in the field of statutory construction and some in the field of constitutional construction; others rejected it outright; and those accepting the theory did so after **Railroad Co. v. McClure** so that their views constituted a misapprehension even at the time of announcement.

* * *

But there is no reason to believe the contract exception disappears with constitutional theories about it. The first definitive announcement of the exception was in 1863 in **Gelcpke v. Dubuque**; for **Ohio Life Insurance & Trust Co. v. Debolt**, decided in 1852, and **Rowan v. Runnels**, decided in 1847, were but dicta. The **Dubuque case** did suggest the impairment guaranty as the basis of the exception to retrospective operation of the overruling decision. However, in 1870, in **Railroad Co. v. McClure**, the Court expressly held, in a case coming up from a state court, that such a change of decision does not violate the impairment guaranty, taking a position since maintained. The rule of the **Dubuque case** survived the rejection of the impairment guaranty; for it was followed after 1870. Even after the impairment guaranty had again been squarely rejected, in 1895, the Court, in 1900, announced that it would follow the **Dubuque case** in cases coming up from the lower federal courts, although in 1899, the Court had held that it would follow the **McClure case** in cases coming up from the state courts. The other of the four sources of the contract exception, **Douglass v. Pike County**, decided in 1879 and containing the widely quoted passage stating the making-law-impairing-contracts theory, followed the same rule as the **Dubuque case**, although it did not overrule the **McClure case** which was followed after 1879. Moreover, after the Court had in 1895 rejected the argument for the guaranty of due process of law as a basis of

the contract exception, it re-affirmed the positions taken in both the **Dubuque case** and the **McClure case**; and, after having the due-process contention again urged upon it in 1905, the Court, in 1924, again expressed an approving view of the rule of the **Dubuque case** but said that case, if it had come up from a state court would have involved "no federal question." Consequently, while the Supreme Court has never followed the contract exception on any ground in cases coming up from state courts, the exception ¹⁷⁹ in the "independent jurisdiction" exercised in cases coming up from the lower federal courts still survives notwithstanding that any imagined constitutional basis for it has totally disappeared or has not been discovered.

REAL BASIS OF THE EXCEPTIONS

In **Gelpcke v. Dubuque**, the positive statement is made that the exception "rests upon the plainest principles of justice." Nine years later in **Olcott v. Supervisors**, the Court repeated that "such a rule is based upon the highest principles of justice." Sixty-one years later, the Court said that the exception had been adhered to in cases coming up from the lower federal courts "where gross injustice would otherwise be done." In commenting on the federal rule, five years after its announcement, the Supreme Court of Iowa said that "the opinion professes to be planted, in its own language, upon 'truth, justice, and law.'" In 1906, the same court denominated the exception as "a sort of equitable doctrine." The Supreme Court of Kansas has called it "only a rule of policy." The Supreme Court of North Carolina has referred to it as a rule "based upon the highest principles of justice"; and the Supreme Court of Appeals of West Virginia has declared that "it is

¹⁷⁹ The cases seem to deal only with changes of decision as to the constitutional validity of statutes. However, since the Supreme Court has always treated cases of constitutional construction and statutory construction coming up from state courts exactly the same (**Railroad Co. v. McClure**, supra note 166, and **Central Land Co. v. Laidley**, supra note 169), there is no reason to believe that it would not treat them the same in cases coming up from the lower federal courts.

difficult to sustain this exception on principle. It is plainly an exception made by the courts at the call of justice." This view—that the "principles of justice" constitute the basis of the federal contract exception—conforms to the fact that the Supreme Court has developed the exception only in its "independent jurisdiction" and has never announced any constitutional basis for it which it has not expressly repudiated.

The contract exception in the state courts has been, it is true, frequently planted on the making-law-impairing-contracts passage from **Douglass v. Pike County**. However, in statutory construction cases, other grounds have been announced. The Supreme Court of Alabama, along with the making-law-impairing-contracts reason, declared, in **Farrior v. New England Mortgages Security Co.**, that retrospection of overruling decisions "must be radically wrong. Such principle or rule of law would clog business transactions, unsettle titles, and destroy all confidence in the decisions of the supreme court of the state." The Supreme Court of Montana, without assignment of other grounds, said: "It would be manifestly unjust and improper to deprive the shipper of its legal right . . . simply because of the later opinion expressed by this court repudiating its former decision." The Supreme Court of North Carolina in **Hill v. Atlantic & North Carolina Railroad Co.**, set alongside the impairment guaranty another reason in the following words: "This court in **State v. Bell**, gave practical effect to the rule that the reversal of a precedent should not be allowed to work an injustice . . . Was that not the only fair and proper course to pursue, and would other have commended itself to our sense of right? The opposite rule would have met strong condemnation, as being contrary to the plainest principles of justice." And that court did more. It linked the contract exception with the personal-rights exception of the criminal case of **State v. Bell**, in which, the court had reasoned: "While it is true no man has a vested right in a decision of the court, it is equally well settled that where, in the construction of a contract or in declaring the law, respect-

ing its validity, the court thereafter reverses its decision, contractual rights as acquired by virtue of the law as declared in the first opinion will not be disturbed. We have diligently searched for authority by which courts have been governed in cases such as the one before us. We find nothing very satisfactory. . . . We have deemed it but just to the defendants and not at variance with any authority in this court, to order a new trial. . . . If the defendants shall be able to establish their defense in accordance with the ruling in **Neal's** case, they are entitled to do so; but the construction now put upon the statute will be applied to all future cases." If the contract exception and the personal-rights exception applied in criminal prosecutions are related, that relation, since no constitutional ground is given in the criminal case, must be that the two exceptions rest upon the common ground of the "plainest principles of justice." While both **Hill v. Atlantic & North Carolina Railroad Co.** and **State v. Bell** are cases involving changed constructions of statutes, the North Carolina court has, relying upon them, extended the contract exception to cases overruling common law precedents. In **Hill v. Brown**, that court, in addition to the impairment guaranty, gave the following reason:

"We deduce the well-settled principle from a number of authorities that the law of contract enters into the contract itself and, in the construction, forms a part of it. It is practically a dormant stipulation in the contract, and it must be enforced as a part of it, and as it is construed at the time the contract is made." But the court did not stop there; it went on to say that the principle it was applying had been fully recognized in **Hill v. Atlantic & North Carolina Railroad Co.**, quoting therefrom what was quoted in that case from **State v. Bell**. By this line of reasoning the court unshackled the contract exception and grounded it, both in cases overruling statutory constructions and in cases overruling common law precedents, on the same "principles of justice" which are to be observed also in criminal cases. In denying retrospection of a decision overruling an equity precedent, the Supreme Court of

Alabama stated that it did so "that no injustice may be done." Consequently, the contract exception in some state courts too has been rested on "principles of justice" as a sole ground or as a ground in addition to the impairment guaranty.

This view is confirmed by the personal-rights exception in the criminal cases. We have already seen how **State v. Bell** and the contract exception have been linked together. In **State v. Longino**, the Supreme Court of Mississippi mentioned the contract exception as if to indicate that its reason is fully in accord with the following: "We think that a change of decisions involving the interpretation of criminal statutes should have a prospective effect. This rule seems to be just and the most reasonable rule. This rule applies the same principle as the constitutional prohibition of ex post facto legislation. It will prevent injustice and also prevent cruel and unusual punishment." The court also cited **Ingersoll v. State**, which was a prosecution under a liquor law of 1853. The statute had been upheld by the courts but was repealed by an act of 1855. The repealing act had been held invalid in 1858. The Supreme Court of Indiana then stated: "Under such circumstances, it would be unjust—would be a violation of all principles of right—to hold that the act of 1853 was all this time in force, and the people incurring its penalties. It would make the law a concealed trap to catch victims." In **State v. O'Neil**, a case involving a change of decision on the constitutional validity of a penal statute, the Supreme Court of Iowa, after discussing the contract exception, stated: "These cases are cited, not as indicating any constitutional duty on the part of the courts of a state to protect a litigant in rights which he in good faith supposed he had already acquired by reason of previous decisions of the same court in other cases, but for the purpose of illustrating the extent to which a court may properly go in administering the law for the purpose of effectuating justice; that is, for the purpose of rendering such decision as shall appeal to intelligent and fair-minded people as right and proper. The assumption is that the

statutory criminal law is to be administered in accordance with the general principles of right and justice recognized in the common-law system. . . . Respect for the law . . . is weakened, if men are punished for acts which according to the general consensus of opinion they were justified in believing to be morally right and in accordance with law. . . . We do not believe such exception to be against public interest but rather in furtherance of justice. Since the Supreme Court of the United States has held that a change of decision in the construction of a substantive criminal statute or in a rule of criminal procedure does not violate the ex post facto prohibition and has rejected the contention that the guaranty of due process of law is infringed by overruling "well-established precedents" in a case of criminal contempt, the personal-rights exception of the criminal cases also must rest on the "principles of justice" rather than on constitutional grounds. And the inter-linking of this exception and the contract exception in the reasoning supporting each reemphasizes that the "principles of justice" are the foundation of the latter too.

(For the sake of brevity, we have omitted various footnotes, giving citations, cross references and comments.)